

## Justice O'Connor and Federalism

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### I. INTRODUCTION

This is now, without question, the Sandra Day O'Connor Court. Out of tradition and deference to the Chief, it is commonly referred to as the Rehnquist Court. But let there be no mistake: for now, a single Justice, O'Connor, is in control. In virtually every area of constitutional law, her key fifth vote determines what will be the majority's position and what will be the dissent. Lawyers who argue and write briefs to the Court know that often they are, for all practical purposes, arguing to an audience of one.

Statistics confirm this. Last October Term 1999, the Supreme Court decided 73 cases. Justice O'Connor was in dissent only four times. In contrast, Justice John Paul Stevens dissented twenty-eight times, while Justice Ruth Bader Ginsburg was in the minority twenty-three times. Among conservatives, Justice Scalia dissented fifteen times and Justice Thomas twelve times. Nor is this a one-Term phenomenon. The year before, Justice O'Connor was in the majority in sixty-seven to seventy-five cases decided.

Perhaps even more significantly, Justice O'Connor was in the majority in virtually all of the 5-4 decisions. Last October Term 1999, twenty-one of the seventy-three cases were resolved by 5-4 margins. Justice O'Connor was in the majority in nineteen of those decisions, the most of any Justice on the Court.

Perhaps most notably, Justice O'Connor is the crucial fifth vote in cases concerning federalism. As a former state legislator and state appeals court judge, O'Connor has expressed a strong belief in the need for judicial protection of state governments throughout her tenure on the Court. In her initial years on the Court, she wrote important opinions limiting the scope of federal habeas corpus review and emphasized the need for deference to state court decisions.<sup>1</sup> Also, she was a frequent dissenter in cases that rejected states' rights challenges to the constitutionality of federal laws.<sup>2</sup>

During the 1990s, in a series of 5-4 decisions, the Court aggressively used federalism as a limit on federal power.<sup>3</sup> The Court narrowed the scope of

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1. See, e.g., *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (limiting the definition of "cause" to demonstrating cause and prejudice to justify a subsequent habeas petition); *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (requiring exhaustion of all claims in a habeas petition before it can be heard in a federal court).

2. See generally, *Federal Energy Regulatory Comm'n (FERC) v. Mississippi*, 456 U.S. 742 (1982); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

3. See Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 *MCGEORGE L. REV.* 915, 920, 937 (2001).

Congressional authority, most notably the commerce power;<sup>4</sup> revived the Tenth Amendment as a limit on federal power;<sup>5</sup> and greatly expanded the scope of state sovereign immunity.<sup>6</sup> Justice O'Connor was in the majority in every one of these cases and wrote the opinion for the Court in key decisions such as *New York v. United States*,<sup>7</sup> which revived the Tenth Amendment as a limit on Congress' powers, and *Kimel v. Florida Board of Regents*,<sup>8</sup> which held that state governments may not be sued for violating the Age Discrimination in Employment Act.

There is no doubt that federalism is integral to Justice O'Connor's constitutional philosophy and that her views on federalism are crucial in how the Court has protected federalism in the last decade.<sup>9</sup> As Professor Stephen Wermeil observed:

If there is any unifying theme to Justice O'Connor's opinions . . . , it appears to be her own brand of federalism. She is strongly motivated by her own abiding faith in good government at the state level and her belief that the Framers of the Constitution envisioned a genuine partnership of shared powers between the federal government and the states. Her experience as a state legislator and judge gives her a degree of trust in state government and state courts that goes well beyond that of her colleagues.<sup>10</sup>

Part II of this essay briefly reviews the Rehnquist Court's federalism decisions and Justice O'Connor's contribution to them. Part III critiques Justice O'Connor's federalism jurisprudence. Specifically, three criticisms are presented. First, Justice O'Connor fails to explain why protecting state governments is more important than achieving the social objectives contained in the federal laws. Second, Justice

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4. See *United States v. Lopez*, 514 U.S. 549 *passim* (1995) (finding that the federal Gun-Free School Zone Act is unconstitutional as exceeding the scope of Congress' commerce power); *United States v. Morrison*, 529 U.S. 598 *passim* (2000) (holding that the civil cause of action for gender motivated violence within the Violence Against Women Act is unconstitutional as not within the scope of Congress' Commerce Clause authority).

5. See *New York v. United States*, 505 U.S. 144 (1992) The Court explained that Congress may not compel state legislative or regulatory activity. *Id.* at 149. Therefore, a provision of the Low Level Radioactive Waste Disposal Act was unconstitutional as an impermissible conscription of state governments in violation of the Tenth Amendment. *Id.* See *Printz v. United States*, 521 U.S. 898 *passim* (1997) (finding the federal Brady Handgun Control Act, which requires state and local law enforcement personnel to conduct background checks before issuing permits for firearms, violates the Tenth Amendment.).

6. See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79-80 (2000). State governments may not be sued in federal court for violating the Age Discrimination in Employment Act, as the law is not a valid exercise of Congress' section five power that authorizes suits against state governments. *Id.* at 66. See *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that because of state sovereign immunity a state government may not be sued in state court without its consent); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 *passim* (1999) (holding that the Eleventh Amendment bars a claim against a state for violating patents).

7. 505 U.S. 144 (1992).

8. 528 U.S. 62 (2000).

9. Justice O'Connor expressed these views even before being named to the Supreme Court. See Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 *passim* (1981).

10. Stephen J. Wermeil, *O'Connor: A Dual Role: Introduction*, 13 WOMEN'S RTS. L. REP. 129, 139 (1991).

O'Connor fails to explain why safeguarding state immunity is more important than ensuring state accountability. Third, Justice O'Connor fails to explain why deference to state courts is more important than protecting individual rights. Finally, the paper concludes by suggesting that the decision in *Bush v. Gore*,<sup>11</sup> which Justice O'Connor joined, is inconsistent with her federalism jurisprudence.

I have no doubt that the Rehnquist Court will be most remembered for its dramatic changes in the law concerning federalism. Justice O'Connor's voice is not only essential, but has made her one of the architects of the Court's federalism jurisprudence.

## II. JUSTICE O'CONNOR'S FEDERALISM JURISPRUDENCE

Ever since joining the Court, Justice O'Connor has been a strong voice as to the need to protect state governments, especially from federal powers. This was manifest in several doctrines. In this section, I focus especially on the opinions that she has written in this area. The following part of the essay critiques her approach.

### A. *The Tenth Amendment*

From 1937 until 1992, only one Supreme Court decision found that a federal law was violated by the Tenth Amendment,<sup>12</sup> and that case was overruled less than a decade later.<sup>13</sup> Yet, even before 1992, Justice O'Connor expressed the strong view that the Tenth Amendment protects state governments and that the federal judiciary should enforce a limit on federal power.

In *FERC v. Mississippi*,<sup>14</sup> Justice O'Connor wrote a strong dissent urging the Tenth Amendment as a limit on the ability of Congress to compel state action.<sup>15</sup> This case involved a challenge to the Public Utilities Regulatory Policies Act of 1978 which required that state utility commissions consider FERC proposals.<sup>16</sup> The Court emphasized that the federal regulation at issue only forced states to consider adopting the federal standards, it did not force them to do so.<sup>17</sup> Thus, the majority found no violation of the Tenth Amendment.<sup>18</sup> Justice O'Connor, in a strong dissent, found that to compel states to consider adopting federal regulations was, in essence, to conscript the state regulatory process and thus to violate the Tenth Amendment.<sup>19</sup>

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11. 531 U.S. 98.

12. *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

13. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

14. 456 U.S. 742 (1982).

15. *Id.* at 775-97 (O'Connor, J., dissenting).

16. *Id.* at 759.

17. *Id.* at 764.

18. *Id.* at 769.

19. *Id.* at 786 (O'Connor, J., dissenting).

Justice O'Connor's view of the Tenth Amendment attracted support from a majority of the Court in *New York v. United States*.<sup>20</sup> This is unquestionably one of her most important decisions concerning federalism. The case involved the constitutionality of the 1985 Low-Level Radioactive Waste Policy Amendments Act, which created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.<sup>21</sup> The Act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states.<sup>22</sup> Additionally, and most controversially, to ensure effective state government action, the law provided that states would "take title" to any wastes within their borders that were not properly disposed of by January 1, 1996 and then would "be liable for all damages directly or indirectly incurred."<sup>23</sup>

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes.<sup>24</sup> However, by a 6-3 margin, with the majority opinion written by Justice O'Connor, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."<sup>25</sup> Justice O'Connor said that it was impermissible for Congress to impose either option on the states.<sup>26</sup> Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation. Justice O'Connor concluded that it was "clear" that because of the Tenth Amendment and limits on the scope of Congress' powers under Article I, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>27</sup> The primary reason Justice O'Connor gave for Congress' inability to compel states to act is that it would frustrate democratic accountability because voters would not understand that the state was acting pursuant to a federal mandate.<sup>28</sup> The Court explained that allowing Congress to commandeer state governments would undermine accountability because Congress could make a

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20. 505 U.S. 144 (1992).

21. *Id.* at 150.

22. *Id.* at 152.

23. *Id.* at 153-54.

24. *Id.* at 159-60.

25. *Id.* at 173.

26. *Id.* at 175-76.

27. *Id.* at 188.

28. *Id.* at 168.

decision, but the states would take the political heat and be held responsible for a decision that was not theirs.<sup>29</sup> Justice O'Connor wrote:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.<sup>30</sup>

Indeed, Justice O'Connor said that if a federal law compels state legislative or regulatory activity, the statute is unconstitutional even if there is a compelling need for the federal action. Justice O'Connor's opinion for the Court expressly rejected the argument that a compelling government interest is sufficient to permit a law that otherwise would violate the Tenth Amendment.<sup>31</sup>

Subsequent to *New York v. United States*, there have been two Tenth Amendment decisions. Justice O'Connor was in the majority in both, but wrote neither. In *Printz v. United States*<sup>32</sup> the Court applied and extended *New York v. United States*. *Printz* involved a challenge to the federal Brady Handgun Violence Prevention Act.<sup>33</sup> The law required that the "chief law enforcement officer" of each local jurisdiction to conduct background checks before issuing permits for firearms.<sup>34</sup> Following the reasoning in *New York v. United States*, the Court in an opinion by Justice Scalia, found that commandeering the states to administer this federal mandate violated the Tenth Amendment.<sup>35</sup>

Finally, in *Reno v. Condon*,<sup>36</sup> the Supreme Court upheld the constitutionality of the federal Drivers' Privacy Protection Act of 1994.<sup>37</sup> The Act prohibits state departments of motor vehicles, and their employees, from disclosing personal information about individuals without their consent.<sup>38</sup> The Court, in a unanimous opinion by Chief Justice Rehnquist, distinguished *New York v. United States* and *Printz v. United States* on the grounds that those involved Congress imposing

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29. *Id.* at 169.

30. *Id.* at 168-69.

31. *Id.* at 177-78.

32. 521 U.S. 898 (1997).

33. 18 U.S.C. § 922.

34. *Printz*, 521 U.S. at 902.

35. *Id.* at 933.

36. 528 U.S. 141 (2000).

37. 18 U.S.C. §§ 2721-2725.

38. *Reno*, 528 U.S. at 143.

affirmative duties on states, whereas this law was a prohibition.<sup>39</sup> Moreover, the Court found that the law did not target states for regulation, but instead regulated all possessing information about drivers.<sup>40</sup>

The unanimity of *Reno v. Condon*, to say nothing of the result, was a surprise. In the summer of 1999, while briefing was occurring in the case, I was approached to write a brief on behalf of feminist groups, reproductive choice organizations, and groups focusing on domestic violence.<sup>41</sup> Their explicit goal for the brief was to appeal to Justice O'Connor. Understandably, they thought that the Court would be split 5-4 and their hope was that O'Connor might be swayed if she saw the case as involving women's rights. The legislative history of the law showed that it was justified in part by the need to protect women who move to escape domestic violence and also reproductive health care professionals who had been stalked and murdered by individuals who learned their addresses through the use of information gained from state departments of motor vehicles.<sup>42</sup>

Justice O'Connor, as always, was perceived as the swing vote. The unanimous rejection of the Tenth Amendment argument and reversal of the Fourth Circuit was a surprise.

#### B. Limiting the Commerce Power

From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress' Commerce Clause authority. Since then, there have been two major cases restricting Congress' power under this provision. Justice O'Connor was in the majority of both, *United States v. Lopez*<sup>43</sup> and *United States v. Morrison*,<sup>44</sup> though the majority opinions in each were written by Chief Justice Rehnquist. In *Lopez*, the Supreme Court declared unconstitutional the Gun-Free School Zones Act of 1990 which made it a federal crime to have a gun within one-thousand feet of a school.<sup>45</sup> The Court held that the law exceeded the scope of the commerce power because it was not regulating the channels of interstate commerce, or persons or

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39. *Id.* at 151.

40. *Id.*

41. The brief was written on behalf of the Feminist Majority, Foundation; American Civil Liberties Union; American College of Obstetricians and Gynecologists; Center for Reproductive Law & Policy; National Abortion Federation; National Abortion and Reproductive Rights Action League; National Center for Victims of Crime; National Coalition of Abortion Providers; National Coalition Against Domestic Violence; National Organization for Women Foundation, Inc.; National Women's Health Organization; NOW Legal Defense and Education Fund; Pennsylvania Coalition Against Domestic Violence; Planned Parenthood Federation of America, Inc.; STOPDV, Inc.; The Women's Law Project.

42. Statement of Senator Barbara Boxer, Driver's Privacy Protection Act 1 (October 26, 1993).

43. 514 U.S. 549 (1995). *See id.* at 567 (declaring unconstitutional Gun-Free School Zone Act as exceeding the scope of Congress' power).

44. 529 U.S. 598 (2000). *See id.* at 601 (holding the civil cause of action for gender motivated violence within the Violence Against Women Act is unconstitutional as not within the scope of Congress' Commerce Clause authority).

45. 18 U.S.C. § 922(q)(2)(a); § 921(a)(25).

things in interstate commerce, or activities having a substantial effect on interstate commerce.<sup>46</sup>

Justice O'Connor joined a concurring opinion by Justice Kennedy that stressed federalism and the relationship between limiting Congress' authority and protecting state prerogatives.<sup>47</sup> They also emphasized the lack of necessity for the federal law because the vast majority of states already had laws prohibiting guns near schools.<sup>48</sup>

In *United States v. Morrison*,<sup>49</sup> the Court declared unconstitutional the civil cause of action for gender motivated violence within the Violence Against Women Act.<sup>50</sup> The provision authorizes victims of gender-motivated violence to sue for money damages. Congress enacted the Violence Against Women Act based on detailed findings of the inadequacy of state laws in protecting women who are victims of domestic violence and sexual assaults. For example, Congress found that gender-motivated violence costs the American economy billions of dollars a year and is a substantial constraint on the freedom of travel by women throughout the country.<sup>51</sup>

In a 5-4 decision, with the majority opinion written by Chief Justice Rehnquist, the Court found that the civil damages provision exceeded the scope of both Congress' commerce clause authority and its powers under section five of the Fourteenth Amendment.<sup>52</sup> As to the commerce clause, the Court reaffirmed *Lopez* and held that Congress could not justify regulating non-commercial activity based on the cumulative impact of conduct across the country.<sup>53</sup> As to section five of the Fourteenth Amendment, the Court reaffirmed the Civil Rights Cases<sup>54</sup> and held that Congress, under section five, may not regulate private conduct.<sup>55</sup> The Court rejected the claim that Congress could act to remedy inadequacies in state and local laws in protecting rights from private infringements.<sup>56</sup>

### C. State Sovereign Immunity

A third major theme to the Rehnquist Court's federalism revival has been aggressive protection of state sovereign immunity. Most notably, the Supreme Court has held that Congress is limited in its power to authorize suits against unconsenting state governments. In 1976, before Justice O'Connor joined the Court, in *Fitzpatrick*

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46. *Lopez*, 514 U.S. at 558-59.

47. *Id.* at 568-83.

48. *Id.* at 581 (Kennedy, J., concurring) (noting that more than forty states had similar criminal laws on the books).

49. 529 U.S. 598 (2000).

50. 42 U.S.C. § 13981.

51. *Morrison*, 529 U.S. at 635.

52. *Id.* at 617, 627.

53. *Id.* at 617.

54. 109 U.S. 3 (1883).

55. *Morrison*, 529 U.S. at 621.

56. *Id.* at 624-26.

v. *Bitzer*,<sup>57</sup> the Supreme Court ruled that Congress, pursuant to section five of the Fourteenth Amendment may abrogate states' sovereign immunity and authorize suits against state governments. The Court explained that the Fourteenth Amendment was meant as a limit on state sovereignty and thus can be used to override the Eleventh Amendment.<sup>58</sup>

In 1989, in *Pennsylvania v. Union Gas*,<sup>59</sup> the Court held that Congress could abrogate the Eleventh Amendment pursuant to its plenary powers, so long as the law in its text clearly authorizes suits against the states.<sup>60</sup> *Pennsylvania v. Union Gas* was a 5-4 decision, with Justice O'Connor joining Justice Scalia's strong dissenting opinion.

In 1996, however, in *Seminole Tribe v. Florida*,<sup>61</sup> the Supreme Court overruled *Pennsylvania v. Union Gas* and held that Congress only may authorize suits when it acts pursuant to section five of the Fourteenth Amendment.<sup>62</sup> The four dissenters from *Pennsylvania v. Union Gas*—Rehnquist, O'Connor, Scalia, and Kennedy—were joined by Justice Thomas to overrule that decision. Chief Justice Rehnquist wrote the opinion for the Court. After *Seminole Tribe*, the key question in determining if a federal law can be used to sue a state government is whether the statute was adopted under section five, so that suit is allowed, or whether the statute was adopted under any other Congressional power, in which case the suit is barred.

In 1999, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* the Court held that unconstitutional for Congress to authorize suits against state governments for patent infringement was unconstitutional.<sup>63</sup> Like *Seminole Tribe*, this was a 5-4 decision with the majority opinion written by Chief Justice Rehnquist. The Court held that the law authorizing suits against states for intellectual property violations was not a valid exercise of Congress' power under section five because there was not sufficient evidence before Congress of a widespread problem of state infringements of patents and copyrights.<sup>64</sup>

In 2000, in *Kimel v. Florida Board of Regents*, the Court held that sovereign immunity bars suits against a state for violations of the Age Discrimination in Employment Act (ADEA).<sup>65</sup> Justice O'Connor wrote the opinion for the Court. The Court concluded that the burdens the ADEA imposes on state and local governments are disproportionate to any unconstitutional behavior that might exist.<sup>66</sup> The Court emphasized that under prior decisions, only rational basis review is used for age

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57. 427 U.S. 445 (1976).

58. *Id.* at 456.

59. 491 U.S. 1 (1989).

60. *Id.* at 7, 19.

61. 517 U.S. 44 (1996).

62. *Id.* at 72.

63. 527 U.S. 627 (1999).

64. *Id.* at 639.

65. *Kimel*, 528 U.S. at 66.

66. *Id.* at 83.



discrimination.<sup>67</sup> Justice O'Connor explained that there is not a "history of purposeful discrimination" based on age and that "age also does not define a discrete and insular minority because all persons, if they live out their normal life spans," will experience it.<sup>68</sup> Indeed, Justice O'Connor said that states "may discriminate based on age without offending the Fourteenth Amendment if the age classification is rationally related to a legitimate state interest."<sup>69</sup> The Court said that age often is a relevant criteria for employers.<sup>70</sup>

Therefore, the Court concluded that the broad prohibition of age discrimination in the ADEA was deemed to exceed the scope of Congress' power.<sup>71</sup> Justice O'Connor declared: "Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."<sup>72</sup>

The Court stressed that the ADEA prohibits a great deal of conduct that is otherwise constitutional.<sup>73</sup> The Court also emphasized that there were no "findings" by Congress of substantial age discrimination by state governments.<sup>74</sup> Therefore, the Court stated that because of the "lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of power under section five of the Fourteenth Amendment."<sup>75</sup>

#### D. Restrictions on Habeas Corpus

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act which substantially changed the law of habeas corpus and in many ways restricted its availability.<sup>76</sup> Before this, however, the Court had imposed several significant limits on habeas corpus. Justice O'Connor wrote many of these opinions and repeatedly stressed the need for deference to state courts.

For example, *Engle v. Isaac*<sup>77</sup> involved the issue of what a defendant must show in order to demonstrate good "cause" for raising an issue not presented at trial. In *Engle*, a defendant used habeas corpus to challenge the constitutionality of the jury instructions used in his trial.<sup>78</sup> In a case decided subsequent to his conviction, the

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67. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

68. *Kimel*, 528 U.S. at 82.

69. *Id.* at 84.

70. *Id.*

71. *Id.* at 91.

72. *Id.* at 82.

73. *Id.* at 86.

74. *Id.* at 89.

75. *Id.* at 91.

76. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32.

77. 456 U.S. 107 (1982).

78. *Id.* at 115.

Ohio Supreme Court held that the type of jury instructions given violated Ohio law and that its ruling applied retroactively to all cases in which they had been used.<sup>79</sup> Nonetheless, the Supreme Court, in an opinion by Justice O'Connor, held that the issue could not be raised on habeas corpus because the defense counsel did not object at trial, even though at that time there was no reason to think that the instructions were unconstitutional.<sup>80</sup> Justice O'Connor, writing for the majority, concluded, "the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial. . . . Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."<sup>81</sup>

Justice O'Connor expressed great reservations about the availability of habeas corpus because it imposes "significant costs" on society, including "undermin[ing] the usual principles of finality" and "cost[ing] society the right to punish admitted offenders."<sup>82</sup> According to Justice O'Connor, these cost considerations outweigh the value of providing relief to an individual who was convicted and incarcerated as a result of admittedly unconstitutional jury instructions.

*Coleman v. Thompson*<sup>83</sup> is another majority opinion written by Justice O'Connor that imposed a strict rule concerning procedural defaults. The Court held that all procedural defaults are to be evaluated under the cause and prejudice standard. Justice O'Connor wrote:

We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that the failure to consider the claim will result in a fundamental miscarriage of justice.<sup>84</sup>

In *Coleman*, a defendant in a capital case was denied his state habeas petition appeal to the state court of appeals because he filed the notice of appeals three days late.<sup>85</sup> The issue was whether the procedural error precluded federal habeas review. The Supreme Court explained that the petitioner's procedural default would preclude federal habeas review unless he could show cause and prejudice or a likelihood of actual innocence.

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79. *State v. Robinson*, 351 N.E.2d 88, 93 (1976). *See also State v. Humphries*, 364 N.E.2d 1354, 1359 (1977) (jury instructions held improper but defendant waived error by failing to object).

80. *Engle*, 456 U.S. at 125.

81. *Id.* at 130.

82. *Id.* at 126-27.

83. 501 U.S. 722 (1991).

84. *Id.* at 750.

85. *Id.* at 727.

In May 1992, Coleman was executed in Virginia despite some evidence that he was actually innocent.<sup>86</sup> No federal court ever heard Coleman's claim.

One more example of an opinion by Justice O'Connor limiting habeas corpus is *Rose v. Lundy*,<sup>87</sup> which held that the federal court must dismiss a habeas corpus petition if it contains both exhausted and unexhausted claims.<sup>88</sup> Habeas corpus petitions will be heard by federal courts only if all the claims presented were raised before the state courts. Prior to *Rose v. Lundy*, eight of ten federal circuit courts of appeals held that if a petition contains both exhausted and unexhausted claims, the federal court should hear the former and dismiss the latter.<sup>89</sup> The Supreme Court, however, disagreed and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims."<sup>90</sup> Justice O'Connor reasoned that the decision in *Rose v. Lundy* will encourage habeas petitioners to litigate all their claims in state court and will facilitate the development of complete records in the state courts.<sup>91</sup>

### III. A CRITIQUE OF JUSTICE O'CONNOR'S FEDERALISM JURISPRUDENCE

In this section, I present three criticisms of Justice O'Connor's federalism jurisprudence. First, Justice O'Connor fails to explain why protecting state governments is more important than achieving the social objectives contained in the federal laws. Second, Justice O'Connor fails to explain why safeguarding state immunity is more important than ensuring state accountability. Third, Justice O'Connor fails to explain why deference to state courts is more important than protecting individual rights.

#### A. *Why is Protecting State Governments So Important?*

A striking, but often overlooked aspect of the Supreme Court's federalism decisions is the unquestionable importance of the laws that were invalidated. Cleaning up nuclear wastes, requiring background checks for gun ownership, keeping guns away from schools, creating a remedy for women who suffer gender-motivated violence, and allowing recovery for infringements of patents, all are compelling government interests. The key question is why safeguarding states is more important than these objectives.

Justice O'Connor (and the Court), never answers this question. Most Supreme Court decisions protecting federalism say relatively little about the underlying

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86. See Jill Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40.

87. 455 U.S. 509 (1982).

88. *Id.* at 522.

89. See Mark J. Ryan, Note, *Rose v. Lundy: The Supreme Court Adopts the Total Exhaustion Rule for Review of Mixed Habeas Corpus Petitions*, 1984 WIS. L. REV. 859, 862.

90. 455 U.S. at 522.

91. *Id.* at 519-20.

values that are being served. When the Court does speak of the values of federalism, it usually does little more than present conclusions that federalism is desirable because it decreases the likelihood of federal tyranny,<sup>92</sup> enhances democratic rule by providing government that is closer to the people,<sup>93</sup> and allows states to be laboratories for new ideas.<sup>94</sup>

Yet, these values have little relationship to the Supreme Court's decisions in the area of federalism. Considering *New York v. United States*, there is no apparent relationship between the ruling and the values of federalism. It seems far-fetched to see federal requirements for safe state disposal of nuclear wastes as putting the country more at risk of federal tyranny. Surely people in the State of New York want safe disposal of nuclear wastes in their midst. If New York was responsive to the people's wishes and assured safe disposal, the federal law is redundant of what would occur anyway and thus, would be a minimal intrusion upon state autonomy. But if New York is unresponsive to its citizens—perhaps because of a desire to avoid cleanup costs or because of pressure from particular industries—federal regulation increases responsiveness. Little seems to be gained from experimenting with not cleaning up the wastes. Under the federal law, states had the ability to experiment with techniques and mechanisms for the cleanup. The one thing that states could not do is experiment by providing inadequate cleanups. The federal law hardly seems an intrusion upon desirable and reasonable state experimentation.

In fact, the absence of a functional analysis can lead to Supreme Court decisions that are counterproductive in terms of the goals sought to be achieved. For instance, in *New York*, the Court's express purpose is protecting state governments. Yet, the Court's ruling actually could have exactly the opposite effect. The Court in *New York*, said that Congress could set out detailed standards for how nuclear wastes are to be handled and could require that states comply with them.<sup>95</sup> *New York*, however, clarified that what Congress could not do is force states to devise means for dealing with the problem.<sup>96</sup> In other words, it is impermissible for Congress to let the states decide for themselves how to handle the wastes, but it is permissible for Congress to force the states to do so in a particular manner. Yet, the former would allow the states more discretion and choices and thus be more protective of state sovereignty than the approach that the Court was willing to allow.

Justice O'Connor in her majority opinion in *New York*, said that protecting accountability was the primary justification for the anti-commandeering principle;

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92. See Andrew Rapczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380 (describing this justification for protecting federalism).

93. DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* 92 (1995).

94. Justice O'Connor has made this argument. See *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 787-88 (1982). (O'Connor, J., dissenting) ("[T]he Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 states serve as laboratories for the development of new social, economic, and political ideas.").

95. *New York*, 505 U.S. at 159-60.

96. *Id.* at 166.

the concern is that people will be confused about who to hold responsible when there is a federal mandate to state government. There was no explanation as to why the voters could not understand when the state was acting pursuant to a federal mandate. Justice O'Connor assumes that if Congress forces the states to do something, voters will not hold Congress responsible but will blame the conduct on the primary actor, state governments. Voters, however, can surely comprehend when a state is acting because it is required to do so by federal law. Every person does many things that he or she otherwise would not because of federal mandates. Paying taxes is a simple example. Why then cannot people understand that a state government, too, might have to do something because of a federal mandate?

State government officials, of course, could explain to the voters that the federal government required the particular actions. Justice O'Connor never explains why the federal government will not be held accountable under such circumstances.

Thus, Justice O'Connor's federalism opinions, and all of the Court's recent federalism decisions, fail to explain why protecting state governments is more important than achieving the compelling goals of the legislation. There is a strong belief in the importance of safeguarding state autonomy, but this is assumed and never explained.

*B. Why is Safeguarding State Immunity More Important than Ensuring State Accountability?*

Second, and related, Justice O'Connor's sovereign immunity opinions, and the Court's rulings in this area, fail to explain why protecting state sovereign immunity is more important than safeguarding state accountability.<sup>97</sup> Justice O'Connor and the Court are unquestionably making a value choice. Nothing in the text of the Constitution bars suits against a state by its own citizens in federal court or suits against a state in state court. Yet, the Court has said that the principle of sovereign immunity bars such litigation. The Court has elevated sovereign immunity over all other interests, including enforcing the Constitution and ensuring the supremacy of federal law. The failing is that this value choice is never defended.

Consider Justice O'Connor's other major federalism opinion, *Kimel v. Florida Board of Regents*. At the outset of her majority opinion, Justice O'Connor states that the Age Discrimination in Employment Act is a valid exercise of Congress' Commerce Clause authority and that Congress can regulate the states pursuant to this power.<sup>98</sup> But the Court in *Kimel* concluded that states could not be sued to enforce the ADEA because Congress cannot authorize suits against state governments when acting pursuant to the Commerce Clause. Only statutes enacted

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97. I have made this argument about the Court's sovereign immunity decisions in other contexts. See Erwin Chemerinsky, *Symposium on New Directions In Federalism: The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L. REV. 1283 (2000).

98. *Kimel*, 528 U.S. at 78 (relying on *EEOC v. Wyoming*, 460 U.S. 226 (1983)).

under section five of the Fourteenth Amendment may abrogate a state's sovereign immunity and the Court concluded that the ADEA was not within the scope of this power.

Thus, the effect of *Kimel* is that state employees have a statutory right to be free from age discrimination by state governments, but the right is completely unenforceable. The Court finds that protecting state immunity is more important than holding states accountable. But Justice O'Connor's majority opinion never defends this choice.

The principle that the government must be accountable can be found in many parts of the Constitution. Professor Akhil Amar has argued that it is embodied in the first words the Constitution, "We the People," which makes the people sovereign.<sup>99</sup> Professor James Pfander has persuasively argued that the right to petition, found in the First Amendment, is inconsistent with the notion of sovereign immunity.<sup>100</sup> Professor Pfander demonstrates that "the Petition Clause guarantees the right of individuals to pursue judicial remedies for government misconduct."<sup>101</sup> In a lengthy and carefully researched article, he shows that "[t]he Petition Clause affirms the right of the individual to seek redress from government wrongdoing in court, a right historically calculated to overcome any threshold government immunity from suit."<sup>102</sup>

Why is state immunity more important than accountability? The Court never offers an answer to this crucial question. Again, Justice O'Connor, and the others in the majority, base their decisions on undefended intuitions about the need to safeguard state governments.

### C. *Why is Deference to State Courts More Important than Protecting Individual Rights?*

As described in Part II, Justice O'Connor has been instrumental in narrowing the scope of habeas corpus. As explained, Justice O'Connor has stressed the need for federal judicial deference to state governments. But there is a cost to restricting habeas corpus: individuals with meritorious claims do not get relief. For instance, as discussed in Part II, Justice O'Connor's opinions expanded the doctrine of procedural default. In *Coleman v. Thompson*, for example, Justice O'Connor approved precluding a habeas corpus petition in a capital case because the lawyer miscalculated the filing date by three days. But Justice O'Connor never explained

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99. Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1450-66 (1987).

100. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 *passim* (1997).

101. *Id.* at 905.

102. *Id.* at 981.

why enforcing the state's procedural bar was more important than hearing a capital defendant's claim.<sup>103</sup>

Nor, frankly, can I imagine how the value judgment could be defended. Coleman was executed despite evidence of his actual innocence and without being heard on habeas corpus because of the perceived need to respect state courts and their procedural rules.

There are great benefits to the writ of habeas corpus. Individuals who claim to have been convicted in violation of the Constitution deserve to be heard and federal courts are often an essential forum.<sup>104</sup> Professor Robert Cover argued that the "jurisdictional redundancy" provided by habeas corpus serves many functions in addition to error correction, including greater assurances of legitimacy of decisions to litigants and encouraging innovation through a dialogue between differing court systems and perspectives.<sup>105</sup>

Justice O'Connor, and her conservative colleagues, never explain why deference to state courts is more important than protecting the constitutional rights of criminal defendants. Likely, her rulings are a product of a conservative desire to limit criminal procedure protections and a former state court judge's trust in state judiciaries. Yet, as explained above with regard to the other areas of federalism, Justice O'Connor fails to justify her value choices.

#### IV. CONCLUSION

As I was completing this essay, the Supreme Court decided the landmark case of *Bush v. Gore*,<sup>106</sup> which determined the 2000 presidential election. Justice O'Connor, of course, was in the five-Justice majority that ended the recount in Florida and handed the presidency to George W. Bush. The majority opinion was "per curiam" for the five Justices; Justice O'Connor did not write separately.

There is an enormous amount to say about *Bush v. Gore*, but here, I just want to focus on the federalism aspect of the majority opinion and argue that it was completely inconsistent with Justice O'Connor's commitment to federalism. There were two key arguments presented in the per curiam opinion. First, that counting of uncounted ballots without standards violates equal protection. Second, that there was insufficient time to create the standards and to conduct the count.

The federalism point I want to make concerns the second issue. If it is assumed that counting without standards denies equal protection, there are two ways to achieve equality: count none of the uncounted ballots or count all of the uncounted

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103. See Ann Althouse, *Variations on a Theme of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 994 (1993) (noting that Justice O'Connor made no mention of the importance of the man's life).

104. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 855 (1984); Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 653 (1981).

105. Cover, *supra* note 104, at 661-73; see also Robert Cover & Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

106. 531 U.S. 98.

ballots with standards. The latter obviously is far more consistent with the fundamental right to vote which was the premise for the Court's decision. At the outset of the per curiam opinion, the majority declared: "When the state legislature vests the right to vote for President in the people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."<sup>107</sup> Not counting lawfully-cast ballots seems quite inconsistent with this fundamental right.

Therefore, how does the Court justify stopping the count? A careful reading of the per curiam opinion shows that it based its conclusion on an interpretation of Florida law. Surprisingly, there are only two paragraphs in the per curiam opinion explaining why the count was being halted. The Court stated:

The Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. §5. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demands a remedy. The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. §5, Justice BREYER'S proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an 'appropriate' order authorized by Fla.Stat. §102.168(8).<sup>108</sup>

The Court does not say that federal law creates a December 12 deadline. Nor could it because no such deadline for completing the counting exists in federal law. The federal statute says only that electors chosen by December 12 are conclusively determined to represent the state.

Instead, the Court says that Florida law creates December 12 as the deadline. No Florida statute says this. The Florida Supreme Court said it in a very different

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<sup>107</sup>. *Id.* at 529.

<sup>108</sup>. *Id.* at 533 (citations omitted).



context. Nothing in the Florida Supreme Court's opinion suggested that the Florida legislature intended that deadline to be enforced even if it meant that uncounted votes were not counted. At the very least, the Supreme Court should have remanded the case to the Florida Supreme Court to determine what Florida law requires under this circumstance.

But, of course, the conservative majority on the Supreme Court did not do so and thus denied the state court the ability to interpret state law. Where is the deference to state judges that Justice O'Connor writes about in her habeas corpus decisions? Where is the emphasis on states' rights so evident in the Court's federalism decisions?

The conclusion is that federalism is a value that the conservative Justices, including Justice O'Connor, invoke when it advances their conservative agenda. Justice O'Connor, and the other four Justices who join her, want to limit federal power, as conservatives generally do. Federalism is the guise for doing this. But in *Bush v. Gore*, where the conservative Justices wanted to see George W. Bush prevail, federalism was given no weight whatsoever. Justice O'Connor's vote in *Bush v. Gore* speaks volumes as to what her commitment to federalism is really all about.

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